UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AROOSTOOK COUNTY REGIONAL
OPHTHALMOLOGY CENTER

and

Cases No. 1-CA-29433
1-CA-29434

JACQUELYN SHEPARD, AN INDIVIDUAL
SHEILA LAMOREAU, AN INDIVIDUAL

Kathleen F. McCarthy, Esq.,
for the General Counsel.[1]

SECOND SUPPLEMENTAL DECISION

I. STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. The hearing in this matter was held in Westbrook, Maine, on June 28, 2001. A compliance specification and notice of hearing issued on October 19, 1999, predicated on a Decision and Order of the Board dated April 25, 1995, (317 NLRB 218), enforced, in pertinent part, by the United States Court of Appeals for the District of Columbia on April 12, 1996, (81 F.3d 209). The Board's decision provided that Aroostook County Regional Ophthalmology Center (Respondent) take certain affirmative action, including offering full reinstatement and making whole Jacquelyn Shepard and Sheila Belle-Isle (formerly Lamoreau) for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to reinstate them on May 29, 1992, in violation of Section 8(a)(1) of the Act. Respondent filed an answer to the compliance specification dated November 8, 1999. The Region issued an erratum to the compliance specification dated November 18, 1999. Respondent filed an amended answer dated December 7, 1999. On February 24, 2000, counsel for the General Counsel filed with the Board a “Motion to Strike Portions of Respondent’s Answer to the Compliance Specification and for Partial Summary Judgment.” On March 14, 2000, Respondent filed with the Board, "Respondent's Answer to Notice to Show Cause, Opposition to General Counsel's Motion to Strike and for Partial Summary Judgment, and Motion to Further Amend Answer to Compliance Specification."

[1] By letter to Region 1, dated June 14, 2001, Philip J. Moss, counsel for Aroostook County Regional Ophthalmology Center (Respondent), withdrew as attorney of record. Moss stated in the letter that any response to a pending settlement offer should be directed to attorney George Marcus. Counsel for the General Counsel stated at the June 28, 2001, backpay hearing that no one had filed a notice of appearance on behalf of Respondent. Respondent was not represented at the backpay hearing by counsel, and no one else attended in its behalf. Nevertheless, and in order to preserve Respondent's appeal rights, Marcus will be served with a copy of this decision at the address provided by Moss along with the parties of record.

On January 8, 2001, the Board issued a Supplemental Decision and Order partially granting the General Counsel's motion to strike and for partial summary judgment (332 NLRB No. 164).[2] The Board's Supplemental Decision disposes of many of the issues in this proceeding and its findings and conclusions will not be repeated here. However, the Board did state in its supplemental decision that:

> …this proceeding is remanded to the Regional Director for Region 1 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence concerning paragraphs of the compliance specification as to which summary judgment has not been granted.

I agree with counsel for the General Counsel's position at the June 28, 2001, hearing that, under the Board's Supplemental Decision, the following items remain at issue before me: the Region's overall calculations for the gross backpay and interim earnings for the two discriminatees; a one dollar an hour raise the Region credited to the two discriminatees on their anniversary date in the years of 1993 and 1994; the cash value of a trip to Hawaii paid for by Respondent for certain of its employees in 1994, and whether the Region correctly credited the trip to the two discriminatees in its backpay calculations; the amount of profit sharing contributions that the Region credited to the employees in its backpay calculations; and whether Shepard is entitled to reimbursement for a $976 federal tax penalty and a $146 state tax penalty for an early withdrawal from her individual retirement account which the General Counsel contends was caused by Respondent's unlawful refusal to reinstate her.

As reflected in the Board's underlying decision, Respondent is an ophthalmological center owned by Craig Young, a physician. In May 1992, Young fired four employees including Shepard and Belle-Isle. The Board, as enforced by the court of appeals, found that Young placed unlawful conditions on an offer of reinstatement that he made to the discharged employees. At the time that they were employed by Respondent, Shepard and Belle-Isle were registered nurses. The Board found in its Supplemental Decision that the backpay period for Shepard and Belle-Isle began on May 29, 1992, and ended on June 5, 1996.

In *United States Can Co.,* 328 NLRB No. 45, JD slip op. at 4-5 (1999), enfd. 254 F.3d 626 (7th Cir. 2001), the Board set forth the following:

> It is well-settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed, and that in a compliance proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due, that is the amounts the employees would have received but for the employer's unlawful conduct. *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 178 (2d Cir. 1975); *Basin Frozen Foods,* 320 NLRB 1072, 1074 (1996). In determining the appropriate formula for arriving at gross backpay figures, the Board is vested with a substantial degree of discretion inasmuch as it is impossible to arrive at precise figures because the discriminatees were not employed during the backpay period. *Canterbury Educational Services,* 316 NLRB 253, 254 (1995), citing *NLRB v. Brown & Root,* 311 F.2d 447 (8th Cir. 1963). Any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.,* 313 NLRB 902 (1994).
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[2] On March 22, 2001, the General Counsel issued an amendment to compliance specification, and on April 5, 2001, Respondent filed an answer to the amendment.

Once the gross backpay amounts are established, the burden shifts to the employer to establish facts that would negate or mitigate its liability. *NLRB v. Mastro Plastics,* 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). In short, the burden is on the employer to show, through a preponderance of credible evidence, *Browning Industries,* 221 NLRB 949, 951 (1975), that no backpay is owed or that what is alleged to be owed should be diminished because the discriminatee was unavailable for work, or neglected to make reasonable efforts to find interim work. *Inland Empire Meat Co.,* 255 NLRB 1306, 1308 (1981), enfd. mem. 692 F.2d 764 (9th Cir. 1982).

A. The 1993 and 1994 Wage Increases

Region 1 Compliance Officer Elizabeth Gemperline was the only witness who testified at the backpay hearing.[3] Paragraph 3 of the compliance specification asserts that Respondent gave a $1 per hour raise to each of its registered nurses (RNs) on their anniversary dates in 1993 and 1994. Respondent in its answer asserted that some but not all RNs received pay increases in 1993, and that only one of them received an increase in 1994. It asserts in its answer that pay increases varied in amount, were not routine, and that neither Shepard or Belle-Isle would have been entitled to wage increases in those years. The Board in its Supplemental Decision allowed Respondent to amend its answer to the compliance specification to include two letters, dated November 19, 1996, and April 4, 1997, that Respondent's counsel had submitted to the Region's Compliance Officer.

It was argued in Respondent's April 4, 1997, letter that:

> ACROC disputes Ms. Crovella's statement in Par 3(a) of her letter that all of ACROC's RN'S, LPN's and technicians received raises on their anniversary dates in 1993 and 1994. The data which ACROC sent you does not support that conclusion. ACROC also disputes Ms. Crovella's assumption that Ms. Shepard and Ms. Belle-Isle would have received raises of $1 per hour on their anniversary dates in 1993 and 1994, and her statement in footnote 2 of her letter that this is 'an amount commonly given to employees for a raise.' There is no support in the record for the statement in that footnote, and I am aware of no other support for it. In fact, as set forth in my letter to you dated November 19, 1996, it is ACROC's position that Ms. Shepard had reached the maximum salary for her position and that Ms. Belle-Isle would not have received any further increase in salary unless and until she obtained additional professional certifications. I must conclude that Ms. Belle-Isle did not obtain any such additional professional certifications after she left ACROC, since there is no mention of such in Ms. Crovella's letter.

Concerning Respondent's claim that Shepard was at maximum salary for her position, Gemperline testified that the Region had issued a subpoena to Respondent in response to which Respondent provided a document showing the salary history of Susan Buck, an RN employed by Respondent from June 24, 1985 to July 15, 1992, as revealed by Respondent's November 19, 1999, letter to the Region.[4] Buck's salary history showed that in 1991 she received a raise in the amount of $2080 retroactive to June 24, 1991, her anniversary date, bringing her salary to $33,080. Buck's record has the notation "($1 hr)" next to the $2080

[3] Shepard and Belle-Isle were present at the hearing but were not called to testify.

[4] By letter to the Region dated January 15, 1997, Respondent's counsel Moss stated that the Region had issued a subpoena to Respondent seeking certain records, and I have credited Gemperline's testimony that Buck's payroll records were produced from Respondent's files.

raise.[5]

Respondent's November 19, 1996, letter to the Region contains a summary of the raise history of 14 employees, eight of whom were RN's. It is stated therein that Shepard worked several years at another eye facility before coming to Respondent, that prior to coming to work at Respondent she was an RN and a certified ophthalmic technician. The letter reveals that Shepard was hired on June 18, 1990, with a starting salary of $30,000, and that in 1991 she was given a merit raise of $2080, bringing her salary to $32,080. It is argued in the letter, that "This brought her to the top of the pay scale that an RN/tech could earn at ACROC without supervisory responsibilities."

As set forth above, RN Buck's salary in 1991 was $33,080. However, Respondent made no claim that Buck had supervisory responsibilities at Respondent. Rather, it contended in its November 19, 1996, letter that Buck served as a recovery room nurse and that her raises were based on the "special skills she brought to our recovery room." In fact, Buck was alleged as one of four discriminatees in the underlying decision and there was no claim therein that she was a statutory supervisor. The administrative law judge found in the underlying decision, that, "As far as the record here is concerned, (Young) is ACROC's only supervisor*." Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 225 (1995). Thus, I have concluded that Respondent has presented a shifting position in support of its claim that Shepard's salary should have been capped at $32,080, and that it has not established that it had a pay cap in effect for its non-supervisory RN's.

Respondent's November 19, 1996, letter established that it had three RN's employed for the complete year in 1993, and that they each received pay raises, but that they varied in amounts in the sum of: $5000, $4000, and $1000. Respondent also listed four other employees in the letter who were in its employ in 1993. Each of these employees occupied less skilled positions than RN's but each received a raise that year ranging from $2000 to $4000, with one employee receiving a $2 an hour raise. Thus, Respondent's records show that each of its non-physician medical staff employees employed in 1993 received raises.[6]

The General Counsel's assertions in its backpay specification that Respondent gave a $1 per hour raise to each of its registered nurses (RNs) on their anniversary dates in 1993 and 1994 is not born out by the wage summary set forth in Respondent's November 19, 1996. While the summary is hearsay as to the wage increases, counsel for the General Counsel did not take issue with its accuracy as to the amounts of wage increases at the hearing. The summary shows that Respondent granted its three RN's in 1993, wage increases of $5000, $4000, and $1000, the average of which is $3,330. In the circumstances here, I do not find that it was unreasonable or arbitrary for counsel for the General Counsel to assert that Shepard and

[5] Calculating 40 hours times 52 weeks with a $1 an hour raise yields the total of $2080.

[6] While Respondent asserts in its November 19, 1996, letter that Belle-Isle (Lamoreau) would not have received any additional raises until she completed certain specialized training in the field of ophthalmology, it produced no testimony or documentary evidence at the hearing to substantiate this assertion. Moreover, Belle-Isle began working for Respondent as a registered nurse in October 1990, and Respondent's records show that she did participate in one training program in 1992. Respondent's contention that had Belle-Isle remained employed with Respondent that she would not have sought out specialty training in the field of ophthalmology is speculative and should be resolved against the wrongdoer, not the discriminatee. In any event, Respondent has not established on this record that further training was a condition precedent for Belle-Isle's receipt of a wage increase.

Belle-Isle would have received wage increases of $2080 on their anniversary dates in 1993. In this regard, both Shepard and Buck and received a $2080 in 1991, and Buck's pay record reveals that the raise was made retro-active to her anniversary date. Accordingly, I find that the Region appropriately accorded Shepard and Belle-Isle with raises in the amount of $2080 in 1993 in its compliance specification.

Respondent's November 19, 1996, summary reveals that it only had one RN in its employ for all of 1994 (Julie Clark). Clark received a $4000 raise in 1993, and a $3000 raise in 1994. LPN Tina Knight, who was employed by Respondent for all of 1994, received a $2000 raise in 1993 and a $4000 raise in 1994. Certified technician Gayle James received a $4000 raise in 1993 and a $2000 raise in 1994. These were the only full-time nursing or technical employees listed in Respondent's November 19, 1996, letter who worked for Respondent for all of 1994. Based on Respondent's salary records, I conclude that it was reasonable for the General Counsel to contend that had they remained in Respondent's employ in 1994, Shepard and Belle-Isle would have received pay raises of $2080 on their anniversary dates and I so find.

B. The 1994 trip to Hawaii

In paragraph 2 of the compliance specification the Region alleged that:

> An appropriate measure of the gross earnings for each discriminatee during their backpay periods is their gross biweekly earnings at the time of their terminations, plus the pay raises they would have received, and all bonuses to which they would have been entitled, the cash value of the 1994 trip to Hawaii that Respondent sponsored, and the benefits to which they are entitled under Respondent's profit sharing plan.

It its further stated in paragraphs 11(d) and 12(d), that the value of the Hawaii trip for the employees is set forth in Appendix A and B. In the fourth quarter of each Appendix for 1994 under the bonus column there is a figure $3,149. In its supplemental decision in *Aroostook County Regional Ophthalmology Center,* 332 NLRB No. 164, slip op. at 2 (2001), the Board granted the General Counsel's motion for partial summary judgement as to paragraph 2 of the compliance specification pertaining to "the appropriate measure of gross earnings with the exception of the cash value of the Hawaii trip."[7] Respondent asserted in its amended answer to the specification that it denied that the value of the Hawaii trip should be included in the calculation of backpay. It asserted therein that, "other employees declined the invitation to travel to Hawaii in 1994 and those that did not go were not paid the cash value of that trip. Shepard and Belle-Isle would have declined the trip, but even if they had gone, it is inappropriate to add the case value of the trip to gross backpay."

In its amended answer to the compliance specification, in paragraph 20(d)(iv), the Respondent further argued that the cash value of the trip to Hawaii should not be included in any monetary award, but if it is, it should be amortized over the 4 calendar quarters of the year in which the trip took place. Respondent attached to two tables to its amended answer, one for each discriminatee, entitled "Backpay Calculation 1-CA-29433 (Hawaii Trip Included)." Under column C Hawaii, Respondent listed four payments of $787.25, one for each quarter of 1994. The sum of the four payments equals $3,149. Thus, the General Counsel and Respondent are in agreement as to the cash value of the Hawaii trip.

[7] However, the Board in its Supplement Decision granted the General Counsel's motion to strike paragraph 20(d)(iv) in Respondent's amended answer contending that the cash value of the Hawaii trip should be amortized over 4 quarters. id., slip op. at 4.

Since the Board in its Supplement Decision has concluded that the cash value of the Hawaii trip should be accorded to the employees, if at all, in the quarter in which the benefit was granted, and since the parties are in agreement as to the actual value of the trip, the only issue before me is whether this is a benefit that would have been granted to the two employees if they had remained in Respondent's employ.

Respondent has provided no basis for its contention that Shepard and Belle-Isle would not have participated in the Hawaii trip. To the contrary, Respondent submitted a document to the Region pursuant to its subpoena request entitled, "ACROC TRAVEL/EDUCATION 1992-1995" showing that Belle-Isle participated in one of Respondent's educational programs in 1992, and that Shepard participated in two such programs during the same year. Thus, the two employees had a history of participating in Respondent's educational programs. Accordingly, I have concluded that the Region appropriately included the cost of the trip to Hawaii for each discriminatee in the amount of $3,149 for the fourth quarter of 1994 in its gross backpay calculations. In this regard, any uncertainty in this backpay proceeding must be resolved against Respondent whose unlawful act gave rise to that uncertainty. See, *U.S. Telefactors Corp.,* 300 NLRB 720, 721 (1990), and *Southern Hospital Products. Co.,* 203 NLRB 881 (1973) enfd. 449 F.2d 749 (5th Cir. 1971).

C. Shepard's change of jobs in 1993

Respondent asserts at pages 8 and 9 in "Respondent's Answer to Notice to Show Cause, Opposition to General Counsel's Motion to Strike and for Partial Summary Judgment, and Motion to Further Amend Answer to Compliance Specification" that:

> In calculating gross backpay for Shepard, Region One assumed that she would have continued working for ACROC without interruption, throughout the backpay period. However, Shepard quit her job with TAMC on July 6, 1993, and took 7 weeks off before starting work at Eye Care and Surgery of Maine on August 23, 1993. See RX-17. Region One should have excluded these 7 weeks from the calculation of Shepard's gross back pay.

Gemperline testified that the reason Shepard had a seven week break in her employment was that she moved to Portland, Maine to enable her to obtain a job in her specialty. RX-17, cited by Respondent is a handwritten letter by Shepard to the Region. She states therein that she incurred moving expenses from Presque Isle to Portland, Maine "for a position in ophthalmology." A letter Respondent submitted from TAMC showing Shepard's employment dates there reveals that it is located in Presque Isle, Maine. Respondent's November 19, 1996, letter to the Region reveals that in addition to being an RN, Shepard was a certified ophthalmic technician before coming to Respondent. Shepard's backpay questionnaire which was tendered to the Board by Respondent shows that Eye Care and Surgery of Maine is located in Portland.

In *A.A. Superior Ambulance,* 292 NLRB 835, 840 (1989), it was stated that part of a respondent's burden in establishing reductions in backpay is to prove that a discriminatee quit an interim job. Once such quit is established, the burden shifts to the General Counsel to establish that such a quit was reasonable. I have concluded that the General Counsel has met this burden here as Respondent had hired Shepard because of her expertise in ophthalmology and it was reasonable for her to continue to seek employment in her field after her relationship with Respondent ended. Moreover, a cursory review of a map shows that Portland is a substantial distance from Presque Isle justifying Shepard's decision to relocate and the resulting

7 week break in her employment status. Accordingly, I reject Respondent's contention that Shepard should be penalized for this 7 week break in her interim employment.

D. The Region's calculation of Shepard's interim earnings

I have found no merit to Respondent's contentions at page 7 of "Respondent's Answer to Notice to Show Cause, Opposition to General Counsel's Motion to Strike and for Partial Summary Judgment, and Motion to Further Amend Answer to Compliance Specification," that the Region under reported Shepard's interim earnings at TAMC, and improperly excluded Shepard's earnings while she was employed part time at Visiting Nurses of Aroostook (VNA) in its interim earnings calculations.

Gemperline testified that Shepard was a salaried employee while working for Respondent and that there were no records available to show how many hours she actually worked there.[8] TAMC sent the Region a letter dated September 16, 1996, stating that Shepard was employed there "as a full time (40 hr per week) registered nurse." Respondent cites, in its answer to show cause, a computer printout tendered by TAMC showing that Shepard worked a total of 1134 hours for TAMC, states that TAMC's payroll records were merged, and it recomputed Shepard's interim earnings at TAMC based on a weekly average over a 31 week period. The Region's Appendix A to its backpay specification showed that, according to its calculations, based on paychecks 22 through 37 on the Region's chart, Shepard earned $19,824.98 while employed at TAMC. The computer printout that TAMC furnished as to Shepard's gross earnings there revealed that she earned $19,848.23 while employed there. Thus, the Region may have under estimated Shepard's earnings at TAMC by about $23. However, Respondent's position statement conceded that the Region had access to certain of Shepard's pay stubs, and in view of the fact the calculation of backpay is not an exact science, Respondent has failed to persuade me that the Region's calculations were sufficiently off to disturb its recommendation as to Shepard's interim earnings pertaining to TAMC. This is particularly so since in quarter 93-2 the Region determined that Shepard was entitled to no backpay and she could have earned the extra $25 at TAMC during this period. As set forth above, when there is a doubt as to a particular calculation the ambiguity should be resolved against the wrongdoer, not the discriminatee.

Respondent also asserts that the Region erred by failing to add Shepard's earnings during her part time employment with VNA to her interim earnings in quarters 93-1 and 93-2. However, Shepard's 1991 raise at Respondent was premised on a 40 hour work week, and TAMC reported to the Region that Shepard worked there as a full time 40 hour a week employee. I have therefore concluded that it was reasonable for the Region to exclude Shepard's earnings from her part time employment at VNA when she was employed there during the same time period that she was a full time employee at TAMC. I also note that the Region's appendix to its compliance specification revealed that Shepard is only due, under its calculations, $157.66 net backpay for quarter 93-1, and that she was due no backpay for quarter 93-2 without taking into account her earnings at VNA. Since these are the only two quarters in dispute as to this contention by Respondent, I find that Respondent's arguments are sufficiently speculative not to disturb the Region's conclusion that Shepard was entitled to $157.66 in backpay for quarter 93-1.

[8] While, Shepard recorded in her backpay questionnaire to the Region that she usually worked 42 to 45 hours a week at Respondent, Buck and Shepard's records reveal that when Respondent gave them a $1 an hour raise in 1991 in the amount of $2080 that the raise was based on a 40 hour work week.

E. Shepard's 1992 withdrawal from her IRA account

The Region issued an amendment to the compliance specification in which it alleged that Shepard incurred a $976 in tax penalty in 1992 in federal taxes due to an early retirement plan distribution, and that she incurred a $146 penalty in her Maine state taxes because of the same early withdrawal. Respondent filed an answer stating that it was unable to admit or deny these allegations because it was not able to take discovery of Shepard and therefore it denied the allegations. Shepard did not testify at the hearing. Gemperline identified Shepard's federal and state tax returns in 1992, which were entered into evidence showing that she made a $9,759 withdrawal from her IRA. Gemperline testified that Shepard told her that she had to withdraw from her 'IRA' because of lack of funds resulting from her discharge. This testimony is unsubstantiated hearsay. I also note that there was no testimony as to when in 1992 that Shepard made the withdrawal from her IRA. The compliance specification showed that Shepard's net backpay for 1992 was $4219.68. Thus, based on the evidence presented to me the General Counsel has failed to establish that Shepard's $9,759 withdrawal from her IRA was a direct result of her refusal to accept Respondent's unlawful offer of employment and this contention is dismissed.[9]

F. Belle-Isles' maternity leave

Respondent contends at page 9 of its answer to show cause, that the Region erred in including in its gross back pay the period of time that Belle-Isle was out of work due to maternity leave. Respondent attached Belle-Isle's backpay questionnaire, which she had tendered to the Region, to its answer to show cause. Respondent asserts that the questionnaire shows that Belle-Isle took maternity leave from her interim employer from October 20, 1992, through January 2, 1993. Respondent asserts that, "As of May 29, 1992, the date she was terminated, Belle-Isle had 2 days of paid vacation and 3 days of paid sick leave left for use in 1992, but she would have received no pay for the remainder of the time she took off."

Belle-Isle did not testify at the hearing. She stated in her questionnaire, relied on by Respondent, that she began working for Respondent in September 1990. She also stated that Respondent's vacation policy was 1 week after 1 year and 2 weeks after 2 years. Belle-Isle's record of interim employment as reported in her questionnaire shows that she began working for Houlton Regional Hospital in Houlton, Maine as an RN in the ICU department on June 20, 1992. She reported in the questionnaire that from June 20, 1992, to August 1993, that she commuted 80 miles a day round trip to work. Belle-Isle stated in the questionnaire that she gave birth on December 4, 1992. Belle-Isle also stated in the questionnaire that she absented herself from the job market from October 20, 1992, through January 2, 1992. She stated therein that she had early labor because of the stress of working in the intensive care unit and the long commute and that she had to take a medical leave of absence.

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[9] While the General Counsel briefed the issue, Respondent was without counsel and did not. The General Counsel's request for compensation for tax losses appears to represent a change in current Board law, and therefore the change in such status is reserved for the Board. See, *Paliotta General Contractors,* 333 NLRB slip op. 80, fn. 1 (2001), and *Hendrickson Bros.,* 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). Moreover, as set forth above, the General Counsel has failed to establish that Shepard's withdrawal from her retirement fund was a result of Respondent's refusal to reinstate her.

Gemperline testified that the Region did not subtract the period that Belle-Isle missed work from her backpay period because of the Region's conclusion that Belle-Isle's work at Respondent was less stressful than that required as an ICU nurse, and that since she was involved in eye care at Respondent there was no heavy lifting of patients. She testified that the Region also considered the additional commute to the interim employer. Gemperline testified that Belle-Isle took very little time off after the birth of her child and she contended that Belle-Isle's leave at Respondent would have allowed her to be paid for this work.

The Region accorded Belle-Isle $40 a week travel expenses in its backpay calculations during the period of June 21, 1992, to July 18, 1993. Respondent supplied its own backpay tables in which it also accorded her certain travel expenses in its calculations. Moreover, although Respondent relied on Belle-Isle's backpay questionnaire in support of its claim that the Region erred in including in her backpay the time she was out for maternity leave, Respondent did not take issue with Belle-Isle's other representations in the questionnaire including the length of her commute as reported above. While the representations in the questionnaire are hearsay, I have concluded that the circumstances here render it reliable and I have credited those representations. It has been held that the mere fact that an employee is pregnant during the backpay period does not warrant the conclusion that she is unavailable for work. See, *U.S. Telefactors Corp.,* 300 NLRB 720, 721 (1990). I have concluded that, although Belle-Isle absented herself from the work force during a period of time during her pregnancy and for a short period after she gave birth, this action on her part was motivated by the less favorable working conditions including her lengthy commute at work for her interim employer. Accordingly, I have concluded that Belle-Isle's taking maternity leave at her interim employer was reasonable, and that had she remained employed by Respondent she may not have required more leave than her sick leave and vacation time would allow. Since any ambiguity must be resolved against Respondent, I find that the Region appropriately included the time Belle-Isle took off for maternity leave from her interim employer as time that she would have worked had she remained employed by Respondent in formulating Belle-Isle's gross backpay.

G. Respondent's profit sharing plan

Respondent in its amended answer to the compliance specification disputed the Region's totals as to moneys owed Shepard and Belle-Isle pertaining Respondent's profit sharing plan. A comparison as to Respondent's and the Region's tables relating to profit sharing reveals that the parties were in agreement as to Respondent's contribution rates, the plans performance rates and the timing of Respondent's contributions. However, the parties disagreed on the amounts of gross backpay for Shepard and Belle-Isle to be used in calculating Respondent's contributions. Since I have concluded that the Region's computation of Shepard and Belle-Isle's gross earnings during the backpay period was reasonable, I have determined that the Region's calculations are appropriate for determining how much each employee was owed by Respondent from the profit sharing plan. As found by the Region, and adopted herein it is recommend that Respondent be order to pay Shepard $17,967 for her profit sharing losses, and to pay Belle-Isle $14,136 for her profit sharing losses with interest thereon from June 5, 1996, the date the discriminatees would have been eligible withdraw their profit sharing benefits.

On these findings of fact and conclusions of law and on the entire record, I conclude that Shepard is entitled to backpay as computed in Appendix A and to profit sharing compensation as set forth above, and that Belle-Isle (Lamoreau) is entitled to backpay and medical expenses as set forth in Appendix B, and to profit sharing compensation as set forth above and I issue the following recommended[10]

ORDER

The Respondent, Aroostook County Regional Ophthalmology Center, its officers, agents, successors, and assigns, shall

1. Pay Jacquelyn Shepard the sum of $10,539.97 as the backpay owed from May 29, 1992, through June 5, 1996, plus interest computed in the manner described in *New Horizons for the Retarded,* 283 NLRB 1173 (1987) and that it pay her profit sharing compensation in the amount of $17,967 plus interest in the manner set forth above, minus tax withholdings required by federal and state laws.

2. Pay Sheila Belle-Isle (Lamoreau) the sums of $9,282.62 and $13,268.89 as the backpay and medical expenses, respectively, owed from May 29, 1992, through June 5, 1996, plus interest computed in the manner described in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and that it pay her profit sharing compensation in the amount of $14,136 plus interest in the manner set forth above, minus tax withholdings required by federal and state laws.

Dated, Washington, D.C. August 8, 2001

Eric M. Fine
Administrative Law Judge

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.